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No. 83-802

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BURLINGTON NORTHERN RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY; ST. JOSEPH AND GRAND ISLAND RAILWAY COMPANY, a subsidiary of Union Pacific Railroad Company; and MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,

Petitioners,

v.

C. MICHAEL LENNEN, Secretary of Revenue of the Department of Revenue of the State of Kansas; PHILIP W. MARTIN, Director, Division of Property Valuation of the Department of Revenue of the State of Kansas; and THE DEPARTMENT OF REVENUE OF THE STATE OF KANSAS, an administrative agency of the State of Kansas,

Respondents.

On Petition For Writ Of Certiorari To The Tenth Circuit Court Of Appeals

SUPPLEMENTAL BRIEF OF PETITIONERS CALLING ATTENTION TO NEW CASE

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SUPPLEMENTAL BRIEF OF PETITIONERS CALLING ATTENTION TO NEW CASE

Pursuant to Rule 24.5 of the Rules of this Court, Petitioners submit the following supplemental brief to call this Court's attention to a new case, decided subsequent to the time of Petitioners' last filing, in which a United States District Court in the Eighth Circuit has followed the Tenth Circuit's decision. The case is styled:

> **Burlington Northern Railroad Company v. Bair, Civ. No. 83-100-A (S.D. Iowa, May 25, 1984, reprinted in Appendix A.)**[1]

In the case, Burlington Northern Railroad Company, one of the Petitioners herein, filed an action in the Southern District of Iowa alleging that the State of Iowa had violated Section 306. One of plaintiff's contentions was that in each of the tax years 1981 and 1982, the State of Iowa had assessed all of plaintiff's property in Iowa at a level exceeding its true market value by 90% and 48%, respectively, and that such overvaluation constituted unlawful discrimination against plaintiff in violation of Section 306. On May 25, 1984, the court issued its order dismissing plaintiff's claim under Section 306 for relief from discrimination resulting from the valuation of plaintiff's property at more than its true market value. The district court's ruling is based entirely upon the erroneous standard of proof enunciated by the Tenth Circuit in *Lennen*, as is shown by the following quotation from the district court's order:

> "When plaintiff claims that its properties are valued for ad valorem tax purposes at more than true market value, it must make a 'strong showing of

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[1] The initial opinion entered therein, *Burlington Northern R.R. v. Bair*, Civ. No. 83-100-A (S.D. Iowa April 20, 1984), is cited on page 6 of "Petitioners' Response to Brief for the United States as Amicus Curiae" and reprinted in App. A thereto.

> purposeful overvaluation' of its property 'with discriminatory intent.' *Burlington Northern R.R.* v. *Lennen*, 715 F.2d 494, 498 (10th Cir. 1983). The record in this action fails to show either a purposeful overvaluation or a discriminatory intent."

Petitioners call the case to this Court's attention as further evidence of the need for this Court to grant the writ in this case and to provide a definitive decision on this important question of national transportation policy. Petitioners believe that a denial of the writ can lead only to a further spreading to other circuits of the decision of the Tenth Circuit, which Petitioners and the United States both assert to be erroneous. Petitioners again submit that the case now properly before this Court offers the best, and perhaps the only, opportunity to decide the issue correctly and to protect the national transportation system from the grievious consequences of *Lennen*.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civil No. 83-100-A

THE BURLINGTON NORTHERN RAILROAD COMPANY,

Plaintiff,

vs.

GERALD D. BAIR, Director of the Department of Revenue of Iowa,

Defendant.

FILED
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SOUTHERN DISTRICT OF IOWA

ORDER

On April 20, 1984, the Court issued a Ruling and Order enjoining defendant from excluding fifty-percent of the unit value of plaintiff's property from the tax benefits to which owners of personal property are entitled under the rollback and exemption provisions of Iowa Code sections 427A.33, .2, and .9. At that time the Court indicated that the second issue, involving the claim that the plaintiff's property was valued at a level well-above its true market value, was complex and would require more time to consider, and a second ruling would be entered resolving that issue.

The Court has now determined that plaintiff has failed to establish a separate cause of action for overvaluation under Section 306 of the Railroad Revitalization and Regulatory Re-

form Act of 1976, Pub. L. 94-210, Section 306, 90 Stat. 31, 54-55, 94th Cong. 2d Sess., *reprinted in* [1976] U.S. Code Cong. & Ad. News 180-81 [hereinafter "Section 306"], and a detailed discussion of the evidence and law is not appropriate at this time.

When plaintiff claims that its properties are valued for ad valorem tax purposes at more than true market value, it must make a "strong showing of a purposeful overvaluation" of its property "with discriminatory intent." *Burlington Northern R.R.* v. *Lennen*, 715 F.2d 494, 498 (10th Cir. 1983). The record in this action fails to show either a purposeful overvaluation or a discriminatory intent.

This does not mean, however, that plaintiff's evidence concerning defendant's appraisal of plaintiff's Iowa transportation property is not relevant to the issue involved in plaintiff's severed third claim. The record made thus far can and will be considered by the Court for whatever bearing it may* on the comparative ratios of assessment to true market value of transportation and all other commercial and industrial properties.

IT IS THEREFORE ORDERED that plaintiff's claim under Section* for valuing its property at more than its true market value shall be and hereby is dismissed.

Signed this 25th Day of May, 1984.

W. C. Stuart

W. C. STUART, CHIEF JUDGE
SOUTHERN DISTRICT OF IOWA

*So in original